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Revisiting the Promise of Mediation for Employment Discrimination Claims

Susan K. Hippensteele*

I. INTRODUCTION

Much is written about the nuanced developments of employment and civil rights law in the United States where, for the average employee, combating employment discrimination has long meant conciliating claims through an administrative agency. In most jurisdictions in the United States, plaintiff attorneys willing to litigate employment cases are few, and the Equal Employment Opportunity Commission (EEOC) and state civil rights agencies are so overburdened that they are often unable to process charges in a timely manner.¹ Within this legal climate, the United States has seen a dramatic rise in the use of alternative dispute resolution (ADR) and mediation and conciliation options, as opposed to litigation, to address employee complaints of workplace discrimination.² ADR is so common that some claim even describing mediation as an “option” is a misnomer.³

* Susan K. Hippensteele, Ph.D., J.D., is an Associate Professor of Women's Studies and founding partner (2003-2005) of the Hawaii Women's Law Center, providing low cost legal services in the areas of employment and family law. An earlier version of this paper was presented at the International Conference on Global Efforts in Eliminating Employment Discrimination: and Prospect June 1-2, 2007 Institute of European and American Studies, Academia Sinica 123 Academia Road, Section 2, Nanking, Taipei, Taiwan.

1. One 1995 study found that some plaintiff attorneys would not take a case unless the grievant had at least \$60,000 in back pay damages, see Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 317 (2003), while other attorneys would take grievants' cases with a minimum retainer of \$3000, William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.-Dec. 1995, at 40.

2. EEOC data for 1999-2008 show that a vast proportion of claims filed, *available at* <http://www.eeoc.gov/stats/charges.html> (last visited February 17, 2009) are resolved through one or more conciliation options, *available at* <http://www.eeoc.gov/stats/vii.html> (last visited February 17, 2009) and http://www.eeoc.gov/mediate/mediation_stats.html, while a very small number is addressed through litigation, *available at* <http://www.eeoc.gov/stats/litigation.html>

Many concerned with ensuring the social justice goals and objectives of the 1964 Civil Rights Act (1964 CRA) and its progeny, which were meant for individuals and groups affected by ongoing bias in the contemporary U.S. workplace, remain concerned about the societal implications of the trend toward use of ADR in employment cases. Yet, as this paper discusses below, many employee rights advocates have embraced ADR and mediation for their purported *healing* and *empowering* qualities, giving rise to several questions: Who is being healed? Who is being empowered? And, what is being defined by these terms?

Fairness and equality are core values widely embraced in the United States, and mediation literature is full of promises that mediation will help provide disenfranchised employees with both. But, calls for evidence that mediation is satisfying employees' goals for remedy and restitution rather than subsuming these goals into a discourse of healing have been largely unmet.⁴

This paper generally examines the theory and practice of ADR and specifically examines the role mediation has played in propelling rights discourse away from the center of efforts to achieve equal employment opportunity in the United States. It further addresses assumptions regarding individual employee goals in the context of a legal environment in which litigating to achieve rights-based remedies is increasingly difficult for grievants.

In Part II, I briefly discuss the shifting legal context framing discrimination in the contemporary U.S. workplace, focusing on the

(last visited February 17, 2009). In addition to claims processing through EEOC, many employers provide in-house mediation and/or arbitration. See, for example, the United States Postal Service, which has established one of the largest in-house mediation programs, REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly), available at <http://www.usps.com/redress/welcome.htm> (last visited February 17, 2009).

3. See David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1567-68 (2005), for citations to numerous studies looking at win/loss rates and the conclusion that employees are likely to prevail at trial less than 30% of the time.

4. See Laura Beth Nielsen & Robert Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 663-664, for the point that litigation critics who support mediation and other problem-solving, ADR alternatives to litigation typically fail to base their critiques on empirical data about what actually happens in the employment discrimination claiming process. Further, Professors Neilson and Nelson suggest that legal scholars and attorneys generally lack the ability to critically interpret and evaluate relevant social science literature and social scientists typically do not have adequate legal training or knowledge of the law to make meaningful connections between their data and legal practice. *Id.* But see Sherwyn, Estreicher & Heise, *supra* note 3, for a summary of several empirical studies examining arbitration and comparing outcomes to litigation. Sherwyn and colleagues, like many scholars looking at litigation risk management, focus almost entirely on economic outcome comparisons. *Id.*

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contours of discrimination as both individual and group injury.⁵ In this section, I briefly discuss recent changes in workplace structure that have influenced contemporary employment discrimination response and show how these changes may serve as confirmation of mediation's increasing relevance.

In Part III, I examine the promise of mediation as an effective mechanism for addressing the changing face of workplace discrimination and its injuries, and identify individual, employer, and mediator interests and public policy implications of mediation's increasing popularity as a response to employment discrimination.⁶ I outline relevant issues pertaining to the injury and harm caused by discrimination and discuss general discrimination response options. I then conclude Part III by addressing resolutions and remedies in the context of formal versus informal resolution mechanisms.

In Part IV, I contend that mediation's promise of fairness and equality of outcome remains illusory and its emphasis on theorized, as opposed to applied, objectives has not been adequately addressed in literature.⁷ This section examines the promise of mediation from the employee's point of view. After a brief comparison between mediation theory and practice, I examine structural problems mediation poses for employees, beginning with the role of the mediator in establishing an "appropriate" mediation milieu and parameters for the mediation process. Next, I contrast the well-established parameters for satisfactory resolution and remedy of employment discrimination claims with those available through mediation. Finally, I place the growing popularity of mediation within the sociopolitical context of affirmative action backlash in the United States and the governing myth of a color-blind and gender-blind workplace.

In Part V, I conclude by suggesting that the social policy impact of "mediated" processes and resolutions for discrimination claims is problematic for many women and minority groups and must continue to be closely scrutinized by those seeking a halt to the continuing erosion of several decades' progress toward equal employment opportunity.⁸

5. See *infra* notes 9-91 and accompanying text.

6. See *infra* notes 92-126 and accompanying text.

7. See *infra* notes 127-216 and accompanying text.

8. See *infra* notes 217-221 and accompanying text.

II. FRAMING EMPLOYMENT DISCRIMINATION

"It is, of course, not a new insight to point out that the liberal notion of equality is too limited to affect structural inequalities."⁹

More than four decades have passed since Congress passed the 1964 CRA, formalizing a societal commitment to eliminating employment discrimination against members of minority groups and women. Prior to 1964, courts were the only avenues of redress for those seeking an end to segregated and otherwise discriminatory workplaces. Though the U.S. Supreme Court had ruled *de jure* discrimination unconstitutional in 1954,¹⁰ in reality few individuals affected by invidious discrimination in housing, education, or employment gained meaningful access to the courts as a result of the *Brown v. Board of Education* decision.¹¹ Before and since that time, legal scholars, social scientists, and others in the United States have been deeply divided over the power of law to define discriminatory events and injury and the merits of various legal strategies aimed at transforming social norms of equality and justice.¹²

The 1964 CRA prohibited discrimination based on race, color, or national origin by recipients of federal funds (Title VI) and by private employers of more than fifteen employees (Title VII).¹³ Existing administrative agencies were tasked with the goal of eradicating invidious discrimination.¹⁴ Title VII created a colorable legal claim for those

9. CAROL SMART, *FEMINISM AND THE POWER OF LAW* 140 (1989).

10. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

11. See STEPHEN C. HALPERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* 3 (1995) for the argument that civil rights organizations resorted to litigation after *Brown* for the same reasons they relied on litigation to desegregate public schools (i.e., litigation served as a "surrogate" for political power). Halpern questions whether litigation can ever be an effective strategy where judges are essentially being asked to compel society to do what the majority opposes, yet this is certainly the essence of civil rights litigation. *Id.*

12. See SMART, *supra* note 9, at 3-4, 141-43; Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1467-1482 (2004) (arguing that employment discrimination has been so difficult to address conceptually and procedurally, not only in the United States, but also in other jurisdictions because there are factors that make individual employee claims uniquely complex among legal disputes).

13. See 42 U.S.C. § 2000(d)-(e) (2006).

14. See Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 499 (1987). Responsibility for enforcing compliance with Title VI was vested by Congress in the Department of Justice and the Department of Health, Education, and Welfare. A newly created agency, the EEOC was given the power to

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experiencing employment discrimination, but it was not until 1972, with the passage of amendments to Title VII, that Congress granted the EEOC authority to initiate actions in federal court to enforce provisions of Title VII should informal resolution attempts fail.¹⁵

The EEOC processes claims under numerous antidiscrimination statutes.¹⁶ The Civil Rights Act of 1991 (1991 CRA), providing plaintiffs alleging intentional discrimination the right to jury trials and to punitive damages should they prove their claims,¹⁷ also incentivised employers to develop and enforce strong nondiscrimination policies and make meaningful access to internal resolution options available to employees.¹⁸ However, the legislative history of the 1991 CRA exposes the tension that existed in Congress and the broader legal community between desires to expand civil remedies to employees and concerns over frivolous lawsuits.¹⁹ Rather than

investigate complaints of discrimination and to eliminate newly unlawful discriminatory practices using alternatives to traditional litigation. *Id.* at 487.

15. *Id.* at 487-88. Likewise, Title VI requires agencies to pursue “voluntary” compliance before moving to terminate a program’s federal financial assistance through litigation after an agency investigative finding of racially discriminatory practices by the funding recipient. *Id.*; see also HALPERN, *supra* note 11, at 37.

16. See The U.S. Equal Employment Opportunity Commission, Federal Equal Employment Opportunity (EEO) Laws, available at http://www.eeoc.gov/abouteeo/overview_laws.html (last visited Nov. 15, 2008). The EEOC receives and processes claims under Title VII (CRA of 1964), which prohibits employment discrimination based on race, color, religion, sex or national origin; the Americans with Disabilities Act of 1990 (ADA), which prohibits discrimination against qualified individuals with disabilities in the private sector and in state and local governments; Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibits discrimination against qualified individuals with disabilities in the federal government; the Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older; and the Equal Pay Act of 1963 (EPA), which protects women and men who perform substantially equal work in the same establishment from sex-based wage discrimination. *Id.* Although there is no clear statutory protection against discrimination on the basis of sexual orientation in federal law, the Office of Personnel Management has interpreted the prohibition against discrimination based on conduct to cover discrimination based on sexual orientation. *Id.*

17. Susan Schenkel-Savitt & Brian S. Rauch, *Title VII, ADEA, Civil Rights Act of 1991 and Selected Local FEP Statutes*, in HOW TO HANDLE YOUR FIRST EMPLOYMENT DISCRIMINATION CASE 65, 70 (1999). Under the 1991 CRA, punitive damages may be awarded where discriminatory acts were perpetrated with “malice” and “reckless indifference,” and, while these terms focus on the perpetrator’s state of mind, an employer’s conduct does not have to be determined independently egregious for punitive damages to flow. *Id.*

18. See Beverly Bryan Swallows, *Reducing Legal Risk and Avoiding Employment Discrimination Claims*, 19 FRANCHISE L. J. 9, 16 (1999).

19. Angelito Remo Sevilla, *The End of Duffield and the Rise of Mandatory Arbitration: How the Courts Misinterpreted the Civil Rights Act’s Arbitration Provision*, 93 CAL. L. REV. 323, 355 (2005).

viewing increased litigation as a sign that employees who perceived their workplaces as hostile felt empowered to seek justice through the courts, conservative legislators and “New Democrats” found common ground pressuring civil rights advocates to go outside the courts to pursue their objectives via mandatory arbitration.²⁰

Litigation of employment discrimination cases throughout the 1970s had produced significant changes in employee access to internal grievance mechanisms.²¹ As employees became increasingly sophisticated about their workplace rights and empowered in asserting them, employers began expanding human resource offices in an effort to resolve employee concerns in-house and to avoid the expense and organizational impact of litigation.²²

ADR, first applied to the workplace in the context of labor disputes,²³ emerged as an independent field of legal practice and scholarship in the early 1980s.²⁴ With the rise in workplace litigation, ADR advocates promoted mediation as the superior alternative for employers seeking options for resolving the growing number of employee workplace discrimination claims.²⁵ Proponents suggest the rise in popularity of mediation is linked to widespread consumer satisfaction,²⁶ stemming from mediation’s monetary and nonmonetary savings, speed, efficiency, flexibility of solutions,²⁷ and its problem-solving orientation, as well as the

20. *Id.* at 355-56.

21. Margaret L. Shaw, *Designing and Implementing In-House Dispute Resolution Programs*, in ALTERNATIVE DISPUTE RESOLUTION [ADR]: HOW TO USE IT TO YOUR ADVANTAGE 449 (1999).

22. *Id.* at 449-51.

23. See Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U ILL. L. REV. 583, 585. Yelnosky studied application of mediation in Title VII cases and found it to be linked to employee dissatisfaction with limited options for systemic change through a traditional litigation framework. *Id.* See also Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances?* 9 OHIO ST. J. ON DISP. RESOL. 27, 32-36 (1993) (containing a study of union grievance mediations, where mediation was the last step employed in the grievance steps and showing that there was a high percentage of satisfaction with this method).

24. See Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC’Y REV. 941, 950 (1999).

25. See Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 507 (2003); Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 156 (1999).

26. JOHN M. CONLEY & WILLIAM M. O’BARR, *JUST WORDS: LAW, LANGUAGE AND POWER* 39 (1998). The EEOC website contends that “96% of all respondents and 91% of all charging parties who used mediation would use it again if offered.” The U.S. Equal Employment Opportunity Commission, *Facts About Mediation*, <http://www.eeoc.gov/mediate/facts.html> (last visited Nov. 15, 2008).

27. Berger, *supra* note 25, at 508; see also Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1548 (1991) (stating that mediation is not bound by the rules of evidence and, therefore, solutions may be tailored to the particular context at issue).

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disputants' greater sense of control over the mediation process and outcome, as compared to more formal options.²⁸ Yet, critics urge caution when considering application of mediation to resolve disputes marked by dramatic power differentials,²⁹ by public interest concerns,³⁰ or by bias against a party because of the informality of the procedures themselves.³¹

A. A Dynamic Context

Employment discrimination patterns reflect not only persistent and emerging social tensions but also the failure of civil rights legislation to adequately address oppression and injustice in society.³² Roughly 75,000–80,000 charges of employment discrimination are filed with the EEOC each year, and the EEOC files suit in about one-half of 1% of the cases it receives

28. Angela Garcia, *The Problematics of Representation in Community Mediation Hearings: Implications for Mediation Practice*, 22 J. OF SOC. & SOC. WELFARE 23, 40 (1995).

29. Grillo, *supra* note 27, at 1576. Identifying race and sex differences as particular concerns, Professor Grillo points out that anger expressed during mediation by the party with less social power is generally treated as “off limits” because it is too threatening to the more powerful party and the mediator. *Id.* Grillo argues the prohibition against expressing anger in mediation perpetuates subordination of the less socially powerful party to the mediation. *Id.*; see also Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Reform Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 4 (1993) (analyzing the movement to reform disputing practices in the United States and specifically questioning the meaning of harmony ideology in the context of unequal relationships).

30. See Sternlight, *supra* note 12, at 1487-90. See generally Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L. J. 703, 757 (1997) (explaining that, in situations where social norms are at stake, those social norms affect a mediator and could constrain a disputant's settlement authority).

31. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1400, for the argument that many formal evidentiary and procedural rules were devised to make litigation “fair” to parties regardless of socioeconomic or racial background and may help level the playing field for minority litigants.

32. See Deanna A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 914-15 (1999). Pollard suggests that high profile racial discrimination cases intensify racial tensions in the U.S. as society manifests an increasingly vigorous practice of “taking sides” along racial lines in debates over race consciousness, work and school sensitivity training, and voter initiatives. *Id.* at 914. Notably, the U.S. Supreme Court has significantly eroded protection of women and racial minorities through a “majoritarian” treatment of civil rights and deference to government action that validates and even promotes discrimination and oppression in employment and elsewhere. *Id.*; Berger, *supra* note 25, at 493-502; see also Emily M. Calhoun, *Workplace Mediation: The Twenty-First Phased, Private Caucus in Individual Discrimination Disputes*, 9 HARV. NEGOT. L. REV. 187, 194 (2005) (arguing that the Supreme Court does not address contemporary workplace discrimination because it is not overt and statutes addressing these issues are narrowly interpreted).

annually.³³ State civil rights enforcement agencies receive even more reports, as do in-house human relations and personnel offices tasked by employers with investigating and resolving discrimination related problems internally. Yet, studies suggest that only a fraction of workplace discrimination is reported at all and that patterns of reported discrimination are only part of the story.³⁴

The dynamics of race and sex exclusion and other forms of bias have changed in the United States since the enactment of the 1964 CRA. Obvious job segregation and blatant workplace discrimination have been largely replaced by more subtle, “second generation” discrimination that is less overt.³⁵ Legal scholars relying on social scientific studies of conscious and unconscious bias have suggested that intentional, conscious discrimination now accounts for only a fraction of current workplace discrimination and that most of the discrimination occurring in the workplace today is the result of unconscious bias and stereotypes.³⁶

33. See The U.S. Equal Employment Opportunity Commission, Charge Statistics FY 1997 Through 2007, available at <http://www.eeoc.gov/stats/charges.html> (last visited Feb. 17, 2009) [hereinafter Charge Statistics]; The U.S. Equal Employment Opportunity Commission, Litigation Statistics FY 1997 Through 2007, available at <http://www.eeoc.gov/stats/litigation.html> (last visited Feb. 17, 2009) [hereinafter Litigation Statistics]. In FY 2007, the EEOC received 82,792 charges under all statutes and filed suit in 362 cases—this was the lowest number of charges brought since 2000 when 79,896 total charges were received and 329 charges resulted in litigation. See Charge Statistics; Litigation Statistics. The EEOC reports 72,442 “resolutions” in 2007, which include settlements, withdrawals with benefits, administrative closures, no reasonable cause findings, reasonable cause findings, successful conciliations and unsuccessful conciliations, and also that they found reasonable cause in 3,642 (5%) of cases. The U.S. Equal Employment Opportunity Commission, All Statutes, available at <http://www.eeoc.gov/stats/all.html> (last visited Feb. 17, 2009).

34. Anne Lawton, *The Emperor's New Clothes: How the Academy Deals with Sexual Harassment*, 11 YALE J.L. & FEMINISM 75, 86-87 (1999).

35. Critical race theorists and others have described recent manifestations of covert discrimination and bias in a variety of ways. I attribute early use of the phrase “second generation” discrimination to Professor Maivan C. Lam of the CUNY Graduate Center, Ralph Bunche Institute, who began using it more than a decade ago in public presentations and lectures on the subject of racial discrimination in multiethnic communities. This term has more recently emerged in a modified form referring to second generation discrimination complaints (i.e., terms and conditions of employment rather than failure-to-hire), see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001), and second generation employment mediation as put forward by Professor Berger, who suggests that the enhanced opportunities of women and minorities in the workforce (i.e., the second generation beneficiaries of civil rights gains in education and employment who no longer have to fight to gain access but must, instead, work to maintain their positions in the workforce) justify expanded use of mediation to resolve workplace disputes. See Berger, *supra* note 25, at 507.

36. Pollard, *supra* note 32, at 915. Pollard provides a succinct overview of empirical studies conducted by Patricia Devine which suggest that stereotypes and beliefs are conceptually distinct cognitive functions that are acted out differently by individuals holding varying degrees of prejudice. *Id.* at 920. Devine posited that, unlike stereotypes which are laid down in early childhood and

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Process theorists argue the proper mechanisms for continued social reform exist in the courts, where decisions contaminated by subtle, but still impermissible, factors may be corrected through judicial oversight.³⁷ But, others suggest changes in workplace climate and interactions among an increasingly diverse workforce require a “rethinking” of the regulatory mechanisms through which workplace discrimination has been addressed.³⁸ Professor Susan Sturm argues the changing nature of discrimination itself renders inadequate the rule-oriented approach taken by the courts and many employers for addressing the interactive dynamics of exclusion and isolation that typify current patterns of workplace discrimination, suggesting that such rules may even serve to perpetuate these patterns.³⁹ Professor Vivian Berger

reinforced over the course of an individual’s life, unconscious beliefs are more susceptible to change—akin to “bad habits” that can be “broken.” *Id.*; see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1165-66 (1995) (describing the disjuncture between individuals’ actual experiences of workplace discrimination and the legal models available for interpreting and analyzing the experience); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987) (critiquing the reliance on intentional acts that serves to mask much insidious racism perpetrated against African-Americans and others in the United States).

37. See ANDREW KOPPELMAN, *ANTI-DISCRIMINATION LAW AND SOCIAL EQUALITY* 46 (1996) (describing the potential contribution process theory might make to continuing efforts to curb the effects of antiaffirmative backlash). Koppelman points out that process theory fails to account for the impact of decision maker attitudes because racism contaminates their decision-making in ways the judiciary will be unlikely to recognize or remedy. *Id.* For a lucid analysis of the constraints on political decision-making resulting from racist attitudes, see Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1131 (1988); Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR As Interest-Convergence*, 48 HOW. L.J. 937, 969-70 (2005) (arguing for application of interest-convergence principles in determining whether formalized court claims are a viable resolution option for specific Title VII race-based claims); John Hart Ely, *Professor Dworkin’s External/Personal Preference Distinction*, 1983 DUKE L.J. 959, 978 (1983). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1990).

38. Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 640 (1998) (suggesting that in addition to a more diverse workforce, organizational management and governance no longer typically “conform to the traditional top-down, hierarchical model” legal practitioners expect to see). Sturm argues dynamics and patterns of racial and sex bias are more subtle and interactive as a result. *Id.*

39. *Id.* at 674-75. Professor Sturm points to sexual harassment as one example of the problems that may be created when employers and the courts attempt to fashion strict rules to prevent illegal conduct from occurring. *Id.* She suggests the “safe zones” of conduct that discourage informal social contact between employees actually harm women more than help them—excluding them from opportunities to form networks through which “social capital and access to advancement develop.” *Id.* See also Susan K. Hippensteele, *Mediation Ideology: Navigating Space from Myth to Reality in Sexual Harassment Dispute Resolution*, 15 AM. U. J. GENDER, SOC. POL’Y & L. 43, 54

takes this argument a step further. She suggests that employer–employee relationships have undergone fundamental shifts such that, unlike the past, neither expects nor works toward the long-term commitments of the other, and this fact, combined with a decrease in deliberate and blatant discrimination, makes informal dispute resolution mechanisms a key component to dealing with the “free agency” paradigm that characterizes the contemporary U.S. workplace.⁴⁰

B. Discrimination and Injury

After death and divorce, the loss of a job is considered the third most stressful life event an individual will experience.⁴¹ Even where the discrimination merely involves a “professional relationship that has gone awry,” the resulting dispute will generally occur in a highly charged atmosphere.⁴² However, absent tangible harm such as loss of a job, demotion, or a refusal to hire or promote, the precise injury that accompanies workplace discrimination may be difficult to articulate—and, subsequently, to remedy.

Result-based theorists such as Charles Lawrence and Kenneth Karst suggest that discrimination “based on [biased] assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior . . . [even] where the material harm seems slight or problematic.”⁴³ Such injury is marked by loss of self-respect, feelings of inferiority, and other psychological injury that manifests as depression, anxiety, and anger.⁴⁴ Injury linked to experiences of subordinating, dispossessing, and silencing is compounded by societal norms that mask the fundamental importance group disadvantage has on victims’ individual

(2006), for a discussion of mediation proponents’ arguments that women benefit in multiple ways from employing non-adversarial resolution mechanisms in response to workplace harassment or discrimination.

40. Berger, *supra* note 25, at 488.

41. Carol A. Wittenberg et al., *Why Employment Disputes Mediation is on the Rise*, in WHAT THE BUSINESS LAWYER NEEDS TO KNOW ABOUT ADR 747, 749 (1998).

42. *Id.* at 750 (citing sexual harassment as a common example).

43. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8-9 (1976); see also Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 249 (1983) (arguing for approaches to ending discrimination that emphasize substantive rather than simply formal or process equality); Lawrence, *supra* note 36, at 317.

44. See Brest, *supra* note 43, at 8. While these types of injury are frequently linked directly to resulting economic disruption, they are also significant sources of harm to the victim in and of themselves. See *id.*

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experiences.⁴⁵ In other words, employees who experience discrimination in the workplace are, by definition, members of disadvantaged groups.⁴⁶ As such, whether discrimination is linked to race, sex, sexual orientation, national origin, disability status, or other protected class basis, the experience has both an individual and group injury component.

C. Discrimination Response Options

1. The Formal Charge.⁴⁷

Litigation has been “championed as the guardian of rights of the underprivileged and oppressed” and “criticized as the enemy of truth and justice.”⁴⁸ With the expansion of legal protections afforded employees through the 1991 CRA and court decisions holding employers liable under evolving doctrines of sexual harassment, disability access, and other doctrines, an increasing number of employees have sought relief and remedy through the courts. Yet, the overall picture for grievants who elect the formal charge option is not promising.

In 1991, 7,911 lawsuits were filed in U.S. district courts under federal employment law statutes, and, by 2001, the number of lawsuits had increased to 20,345, with the number peaking at 22,701 in 1999.⁴⁹

45. See CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 128 (1989) (arguing the most pernicious source of bias is the perpetuation of ‘neutral’ norms); Alan Freeman, *Racism, Rights, and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 295 (1988) (suggesting the individualization of discrimination claims has undermined efforts to use antidiscrimination law to promote distributive justice in the face of an historical practice of discriminating against a particular group).

46. Calhoun, *supra* note 32, at 189. But see, Robert Elliot-Fox, *Becoming Post-White*, in MULTIAMERICA: ESSAYS OF CULTURE WARS AND CULTURAL PEACE 12-13 (Ishmael Reed ed., 1996) for the argument that “whiteness has been a costume of privilege” but not a “uniform one.” Fox suggests that whiteness can be, and is in some instances, the impetus for subordination by others, including other whites. *Id.* Fox cites his own experience of having been denied a faculty position teaching black literature because he is white, as an example of such exclusionary practices. *Id.*

47. For purposes of this paper, “the formal charge” includes filing a formal written charge with the employer, the EEOC, and a state agency and using traditional litigation. Filing with either the EEOC or a state agency is a prerequisite to litigation. It may or may not result in a full investigation of the allegations of discrimination since a decision to mediation will typically halt any process that may have been launched when the complaint was filed.

48. Silver, *supra* note 14, at 535.

49. Nielsen & Nelson, *supra* note 4, at 694.

Litigation and arbitration provide claimants an opportunity to obtain tangible remedies, including monetary awards, changes in policies and employer practices, and other prospective relief.⁵⁰ However, most employees who believe they have been subjected to discrimination at work do not sue,⁵¹ and the impediments to litigation for those who wish to do so are many. Relatively few are able to retain effective legal counsel, either because they cannot afford to do so⁵² or because they do not have the information necessary to make informed judgments about who to hire.⁵³ Litigation is time consuming and can be emotionally and physically draining.⁵⁴ Some employees who believe they have found suitable lawyers are later disappointed when the person they hired seems unable to understand and to prioritize their resolution objectives. Employees are free to file formal charges with the EEOC without legal counsel; however, the length of time it takes to process a complaint through EEOC discourages many, if not most, from effectively advocating on their own behalves.⁵⁵

Moreover, antidiscrimination law, as applied by the courts and the EEOC, has developed around a perpetrator perspective that promotes the fiction that discrimination occurs because individual actors behave in ways uncharacteristic of the majority in the workplace.⁵⁶ As a result, jurisprudential construction of employment discrimination has omitted recognition of unconscious bias and does not yet resemble the actual phenomena it “purports to represent.”⁵⁷ Traditional constitutional case law

50. See Sevilla, *supra* note 19, at 328, for the point that arbitrators generally apply external law and arbitration agreements, which can be part of collective bargaining agreements for union employees, will govern which external laws are applicable.

51. Yelnosky, *supra* note 23, at 586.

52. *Id.* at 587; Maltby, *supra* note 1, at 317.

53. Yelnosky, *supra* note 23, at 587. Many attorneys, particularly those without significant employment-law-related experience, are unwilling to take Title VII cases without clear evidence of liability and conduct likely to support a punitive damages award. *Id.* See Howard, *supra* note 1, for discussion of the types of employees most able to obtain representation, as well as litigation outcome data and analysis.

54. See Harkavy, *supra* note 25, at 157-58.

55. Michael J. Yelnosky, *Using Mediation to Resolve Equal Employment Opportunity Commission Discrimination Charges*, in 1995 WILEY EMPLOYMENT LAW UPDATE 21, 48-49 (Henry H. Peritt, Jr. ed., 1995); see also Jared D. Simmer, *Mediation Update: The EEOC Launches a New Nationwide Mediation Program*, LAW. J. Aug. 13, 1999, at 13 (“[I]t is not unusual for a charging party to have to wait two years to have its EEOC charge settled . . .”).

56. KOPPELMAN, *supra* note 37, at 262-63 (pointing out that “harm” is defined as an individualized injury although racism and sexism are most certainly transmitted through, and perpetrated by, cultural practices, which all but the “rawest and nastiest expression[s]” are outside the reach of the law).

57. Krieger, *supra* note 36, at 1217. See also Marcia Mitchell, Jean P. Kamp & William R. Tamayo, *Developments in Federal Employment Litigation: Recent Trends and Emerging Issues in*

reflecting unconscious bias among white male justices may well explain the central role proof of intent has played in Title VII litigation.⁵⁸ The EEOC, which relies heavily on federal case law to guide its interpretation of Title VII, finds cause only rarely and brings suit on a party's behalf even more infrequently.⁵⁹ As a result, although Title VII prohibits unintentional, as well as intentional, discrimination over ninety-five percent of Title VII cases that are litigated involve disparate treatment claims.⁶⁰ Because the overwhelming majority of attorneys will not take an employment discrimination case to court unless they believe the plaintiff can show the plaintiff was individually targeted by intentional discrimination, the injury that flows from stigma and subordination is rarely viewed as a legitimate or persuasive ground for redress.⁶¹ Overall, reliance by the courts on theories grounded in discriminatory motive has rendered Title VII litigation a less than satisfying experience for many plaintiffs.⁶²

2. Informal Resolution Options.⁶³

While the favored forum for seeking meaningful remedy to employment discrimination has been the traditional, adversarial litigation process,⁶⁴ the

EEOC Litigation, in 28TH ANNUAL INSTITUTE OF EMPLOYMENT LAW 403, 414 (1999), for a discussion of damages available under the Civil Rights Act of 1991.

58. See Pollard, *supra* note 32, at 927, for the discussion of the relationship between the U.S. Supreme Court's analysis of Title VII cases and changing understanding of psychological processes underlying such decision-making.

59. See Yelonsky, *supra* note 23, at 587, nn.24 & 25; see also Charge Statistics, *supra* note 26; Litigation Statistics, *supra* note 26.

60. Yelonsky, *supra* note 23, at 588-89. Yelonsky describes the *McDonnell Douglas/Burdine* test for analyzing disparate treatment in which a plaintiff must prove (1) she was a member of a protected class, (2) she held a position for which she was qualified, (3) she was terminated, and (4) her position was unfilled or was filled by someone similarly qualified. *Id.* To avoid liability, the employer must prove a legitimate, nondiscriminatory reason for the discharge. *Id.* at 589. The plaintiff can only prevail by showing the reason was a "pretext for discrimination." *Id.*

61. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987), for the convincing argument that the perspective of the target of discrimination must be the locus of antidiscrimination analysis and decision-making before significant change in outcome of litigation will take place.

62. Krieger, *supra* note 36, at 1177.

63. For purposes of this paper, "informal resolution mechanisms" include all efforts to obtain an employer acknowledged resolution of a complaint short of an investigation and determination of wrongdoing (or not) by the employer or agency that has received a complaint or charge, including mediation and other ADR practices.

64. Delgado, et al., *supra* note 31, at 1391.

use of informal resolution options has steadily increased over the past three decades. Most employers rely on “interest-based” procedures to deal with all but the most egregious incidents,⁶⁵ and proponents of ADR have long argued formal adjudication is inadequate as a means of addressing the relational conflicts, power differentials, and workplace dynamics that lie at the heart of many, if not most, discrimination claims.⁶⁶ Informal procedures such as mediation are perceived as more efficient and expeditious than litigation,⁶⁷ and studies of participant satisfaction suggest a high rate of user satisfaction among both employees and employers.⁶⁸

Informal resolution options are also presented as more likely to provide a flexible process and produce creative outcomes and may be considered particularly appealing where privacy and confidentiality are important.⁶⁹ Employee grievants may consider informal options more conducive to remedying certain types of injury because these processes typically carry with them the promise of “validating” emotional harm with an opportunity to discuss feelings with the other party.⁷⁰ Formal resolution mechanisms

65. Mary P. Rowe, *Dealing with Sexual Harassment: A Systems Approach*, in *SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS AND RESPONSE STRATEGIES* 241, 250 (Margaret S. Stockdale ed., 1996). Rowe defines interest based procedures as those in which employee needs may be more easily met and contrasts them with “rights-based” adjudicative procedures. *Id.* Interest based informal procedures include discussion with the parties and job reassignment. *Id.* Typical rationale for applying interest based procedures is that the harassment or discrimination was the result of a “misunderstanding,” was due to “ignorance” of the perpetrator, or that it may be difficult or even impossible to determine who is telling the truth. *Id.*

66. Sturm, *supra* note 38, at 644.

67. Silver, *supra* note 14, at 555.

68. Yelnosky, *supra* note 23, at 602-03. Professor Yelnosky cites the 1997 GAO survey of federal employee satisfaction with a variety of dispute resolution options. *Id.* This study reports ninety percent of mediation participants rated the process as fair while seventy-two reported being satisfied with the outcome of mediation. *Id.* at 602. In contrast, forty-two percent of participants in the traditional (i.e., formal) resolution process reported the process as fair while forty percent reported being satisfied with the outcome of the formal adjudicative process. *Id.* Employer participants in the GAO study also reported high levels of satisfaction with the mediation citing significantly decreased incidence of formal complaint filings. *Id.* Yelnosky also cites the 1994 EEOC study of participants’ satisfaction with mediation and traditional EEOC process adjudication that reported somewhat less dramatic but nonetheless high overall rates of satisfaction among participants in mediation. *Id.* at 603.

69. See Wittenberg et. al., *supra* note 41, at 750. The authors suggest that employers are always interested in confidentiality for business and publicity related reasons and employees may be similarly concerned about the availability of an informal confidential process where reputational harm, workplace gossip, or the closing off of future employment opportunities would likely follow a highly public complaint. *Id.*

70. See Sternlight, *supra* note 12, at 1486. Most individuals I have worked with both as an attorney and in-house advocate present with a clear expectation that ADR, and mediation in particular, will enable them to speak directly with a perpetrator and be “heard” in a meaningful and respectful way that helps them heal.

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have often been cast as inadequate, unavailable, or even punitive (toward the victim), with informal options serving as the lesser of two evils or, in some cases, as the only viable option.⁷¹ The lower cost of informal processes, particularly mediation, as compared with litigation or arbitration, is also a relevant consideration for both employee and employer. The cost of litigating a discrimination claim will vary for an individual plaintiff but will generally be at least \$25,000 (based on a percentage of any monetary award they receive at trial) while mediation is likely to cost less than \$3,000.⁷² It is likely to cost an employer defending itself against a discrimination claim between \$4,000 and \$10,000 if the case is with the EEOC, at least \$75,000 to take a case to summary judgment, and at least \$125,000, and possibly much more, to defend itself at trial.⁷³

3. Self-Help Options.

A third category of discrimination response options may be categorized as “self-help” options. These include individual efforts to end harassment or discrimination by ignoring the situation, avoiding the perpetrator, confronting the perpetrator individually or with the help of coworkers, or employing other strategies *without* the aid of the employer.⁷⁴ Self-help strategies are typically handled in a private manner, although in some situations a targeted employee or group of employees may elect to make a public showing of their grievance to stimulate a desired response from the employer or to encourage a perpetrator to stop engaging in the objectionable behavior.⁷⁵ Research suggests the majority of employees experiencing

71. Cf. Rowe, *supra* note 65, at 261-62 (stressing the importance of choice of resolution options from the perspective of the complainant, not the investigator).

72. Wittenberg et al., *supra* note 41, at 750; see also Maltby *supra* note 1, at 317 (citing studies addressing the difficulty of grievants finding an attorney willing to represent them in pursuing a claim).

73. Sherwyn et al., *supra* note 3, at 1579.

74. See Rowe, *supra* note 65, at 252.

75. In a previous position I held for several years assisting student and employee victims of discrimination at a large state university, the vast majority of the more than 500 individuals I worked with had utilized self-help prior to seeking help through the institution. In addition, many individuals I came into contact with while in that position who had elected not to file grievances shared personal stories of self-help, including instances such as naming objectionable behavior in group meetings so as to advise colleagues how to help others to avoid being treated in a similar manner, using colleagues as obvious chaperones when meetings with a perpetrator were necessary, or openly questioning an individual about their conduct with witnesses present.

discrimination at work exclusively employ self-help strategies.⁷⁶ Further, most employees who use informal or formal procedures do so only after self-help strategies have failed to end the harassment or discrimination or otherwise remedy its result.⁷⁷

Employees utilize self-help for a number of reasons, many of which overlap with their stated reasons for preferring informal over formal complaint procedures. A clear advantage of self-help over all other options is that it provides a targeted employee with an opportunity to regain the feeling of control lost when the discrimination began.⁷⁸ In cases where direct confrontation of a perpetrator or perpetrators occurs, self-help can be a very effective means of regaining control and resolving the problem without permanently severing important professional relationships.⁷⁹ Further, because societal assumptions about employment discrimination continue to reflect stereotypes of the resulting conflict as “personal” in nature, private efforts to resolve discrimination-related problems may be perceived as more appropriate by colleagues.⁸⁰ And, because the current emphasis on color-blindness and gender-blindness as a workplace norm implicitly renders even overt acknowledgment of race and gender dynamics to be conflict producing, regardless of who does the acknowledging,⁸¹ self-help options are typically perceived as minimizing the risk of retaliation against the injured employee.⁸²

D. Resolution and Remedies

The injury employees of workplace discrimination experience can be difficult to remedy regardless of the resolution venue. First and foremost, the targeted employee experiences the situation as a loss of power and personal/professional autonomy.⁸³ Where the alleged discrimination

76. See Rowe, *supra* note 65, at 252.

77. Cf. *id.*

78. See Rowe, *supra* note 65, at 252.

79. See Sturm, *supra* note 38, at 671-72.

80. See *id.*

81. See *id.* at 672.

82. Virtually all the individuals I assisted while working as in-house advocate for victims of discrimination reported employing self-help options in an effort to minimize their risk of retaliation or avoid further injury and only came forward to file a complaint after self-help measures failed or exacerbated the situation.

83. See generally Howard J. Ehrlich, Barbara E. K. Larcom & Robert D. Purvis, *The Traumatic Impact of Ethnviolence*, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA AND PORNOGRAPHY* 62, 71 (Laura Lederer & Richard Delgado eds., 1995) (discussing the basic findings of stress indicators and traumatic effects reported by workers subject to victimization).

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involves a hostile workplace, an employee is likely to have suffered embarrassment, humiliation, and loss of trust in the perpetrator, coworkers, and the employer.⁸⁴ Where the allegations include disparate treatment and tangible harm such as failure to promote, loss of benefits, demotion, or firing, these effects will be compounded by the employee's sense of unfairness regarding the decision that was made.⁸⁵

Because employment discrimination manifests itself in so many ways, from subtle exclusion and distancing to overtly discriminatory statements to tangible employee actions, resolution and remedy for individual complaints must necessarily be tailored to fit the situation.⁸⁶ At the same time, certain themes have emerged as elements of a satisfactory resolution from the grievant's point of view. First, where employees have direct or indirect knowledge of the victim's allegations, public vindication is a key element of a satisfying resolution because it helps reestablish the victim's credibility among peers and supervisors.⁸⁷ Second, in hostile work environment cases, satisfactory resolution will require changes in workplace dynamics that ensure the discriminatory conduct will not reoccur.⁸⁸ Third, recovery of lost wages, benefits or other tangible and intangible costs of the discrimination is also critical. These may include quality of life costs such as loss of enjoyment of work, depression, anxiety, and impact on family relationships.⁸⁹ Fourth, in all cases resolution must provide the grievant assurance that the grievant will not be subjected to retaliation for having raised the complaint.⁹⁰ This final element is distinguishable from the second element in that it concerns both coworker and management conduct and actions. Many employees fear their coworkers (or employer) will wait long

84. *Id.* at 74.

85. *Id.* at 71.

86. *See generally* Rowe, *supra* note 65, at 251 (stressing the importance of options in resolution for the complainant).

87. *See* Harkavy, *supra* note 25, at 161-62.

88. *See* Rowe, *supra* note 65, at 268-69. Achieving this element of a resolution generally requires change in behavior of perpetrator(s) but also of those who may have witnessed or known about the conduct but chose to ignore it. *Id.* Training within a unit and close monitoring for an extended period of time is usually necessary. *See id.* at 269; Silver, *supra* note 14, at 523-24 (discussing the difficulty of enforcing discrimination complaint resolution agreements that include prospective relief).

89. Ehrlich et al., *supra* note 83, at 68-69, 74-76.

90. *See* Rowe, *supra* note 65, at 262. Rowe suggests that fear of reprisal is an issue for virtually all complaints and witnesses of workplace harassment. *Id.* She cites numerous studies that suggest employers are generally unable to adequately protect complainants and witnesses from reprisal, which can take many different forms. *Id.* at 261.

enough for the situation to “blow over” before taking retaliatory action. Meaningful assurances that such action will not be tolerated are necessary before an employee can feel confident that the effects of the discrimination have been remedied.⁹¹

III. THE PROMISE OF MEDIATION

“[O]f mediation one is tempted to say it is all process and no structure.”⁹²

Mediation has been touted as a “no-risk proposition since the parties have the option of trying it first without giving up any right to proceed with arbitration or litigation.”⁹³ The core values in mediation theory posit a voluntary, norm-generating process that ensures disputant autonomy and control over both process and outcome.⁹⁴ The mediation process is designed to create a paradigm shift for participants who are asked to think about resolution not as a righting of wrongs but rather as an opportunity to come to some agreement about future conduct between the parties.⁹⁵ The atmosphere mediators are trained to evoke is designed to acknowledge disputants’ feelings and egos with an aim toward allowing release of these

91. See *id.* at 262.

92. Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CA. L. REV. 305, 307 (1971). Professor Fuller points out that there is wide disparity between common perceptions and “casual treatment” of mediation and its actual application. *Id.* at 307-08. In practice, he suggests, mediation is often directed toward “discrepant” and even “diametrically opposed results.” *Id.* at 308-09.

93. Gerald S. Clay & James K. Hoenig, *Practitioner’s Guide to Mediation*, HAW. B. J., Jan. 1998, at 10. Because it is non-binding and confidential, parties are informed that information shared between them during mediation may not be used later in litigation should the mediation fail to produce a settlement. See Kent B. Scott & Cody W. Wilson, *Questions Clients Have About Whether (and How) to Mediate and How Counsel Should Answer Them*, DISP. RESOL. J., May-July 2008, at 26, 29-30. The authors describe the typical mediation process as follows: Initially the parties will meet with the mediator or mediators and agree on a process. Clay & Hoenig, *supra*, at 12. Next, the parties will explore, with the mediator, what has happened and how they feel about it. *Id.* After the parties express their initial views, the mediator moves then toward considering avenues for resolution and agreement as to which options may serve as a basis for the resolution. *Id.* The initial session will usually include all parties followed by one or more sessions of “caucusing” between the mediator and the individual parties before they all come together again once the conditions of settlement have been established and generally agreed upon. *Id.* at 12-13. The mediator typically ‘shuttles’ back and forth between the parties paraphrasing each side’s position to the other until a compromise position between the parties is achieved. *Id.* at 13. Throughout the process the mediator emphasizes that the parties are in control of both the process and outcome of the mediation. *Id.* at 12.

94. See Waldman, *supra* note 30, at 764-65.

95. Grillo, *supra* note 27, at 1559-60.

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emotions in a “neutral, dignified environment” that expands the parameters for resolution beyond mere “exchange of money or other items of material value.”⁹⁶

A. *The Mediator as “Neutral”*⁹⁷

A central premise of mediation theory is that disputants have the power to settle their own disputes, but that they have lost their ability to exercise it.⁹⁸ Because the mediator “has no power to impose an outcome on disputing parties,” the mediator’s role is limited to “assisting the parties to reach their own agreement.”⁹⁹ The mediator’s role is to establish a constructive ambience for negotiation, collect and judiciously communicate selected confidential information, help parties clarify values and develop responsible positions, deflate unreasonable claims, seek joint agreement through compromise, keep negotiation going by providing opportunities for face-saving, and articulate a rationale for agreement.¹⁰⁰ Through this process, mediation and the mediator provide participants the opportunity to resolve disputes and have their needs met while maintaining relationships with the other party or parties.¹⁰¹

Crucial to a mediator’s credibility is a reputation for neutrality. In order to act as an effective facilitator, the mediator must have the full trust and cooperation of the parties that the mediator will maintain confidences and make no inappropriate or potentially harmful disclosures to the other side.¹⁰² A mediator who is unable to gain this level of trust with the parties is

96. Clay & Hoenig, *supra* note 93, at 10.

97. Early mediation literature uses *Neutral* as a proper noun. Although the formal use of the term is no longer common, the literature remains full of references to the mediator as the “neutral party” and frequently references the importance of neutrality as a means of developing the confidence of mediating parties.

98. See Clay & Hoenig, *supra* note 93, at 10.

99. STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 91 (1985).

100. *Id.* (citing HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982)).

101. See *id.* at 92.

102. See Dana Shaw, *Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators*, 29 U. TOL. L. REV. 327, 334-35 (1998). Mediation is different from other forms of ADR in two important ways: (1) the mediator is impartial to the parties and the outcome of the mediation, and (2) the entire process is strictly confidential per the Dispute Resolution Act of 1980. *Id.*

unlikely to obtain all the information the mediator needs to mediate the dispute.¹⁰³

The principal safeguard of fairness in mediation is the skill and integrity of the mediator¹⁰⁴ because no certification process or practice rules for mediators exist. Most mediators exhibit a basic orientation toward mediation that is a function of their personality, education, training, and background experience.¹⁰⁵ Some are evaluative, and some are facilitative. Some mediators are substance-oriented while others are process-oriented, and some adopt flexible approaches to mediation while others adopt more structured approaches.¹⁰⁶

The Society of Professionals in Dispute Resolution (SPIDR) organized in 1972 as a forum to discuss the development of ADR and to “define the realm of mediation, including the role of the ‘neutral.’”¹⁰⁷ A central objective of this group, which merged with the Academy of Family Mediators and the Conflict Resolution Education Network to form the Association for Conflict Resolution, has been ensuring that the quality and credentials of mediators do not result in mediation being perceived as a “‘lesser quality of justice’ with risks to an uneducated public.”¹⁰⁸ Yet, it is of note that, among proponents of mediation, stringent qualification standards for mediators that would eliminate the risk of unqualified or incompetent individuals setting up a mediation practice are considered potentially harmful to the flexibility of mediation, and many ADR proponents express concern that such standards would ultimately erode the mediation process and its practice.¹⁰⁹ At this time, general guidelines have

103. See Joseph Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 108-09 (1981).

104. See Charles Pou, Jr., *Assuring Excellence or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303, 307-10.

105. The basic orientation of a mediator is distinguishable from mediation models, as discussed *infra* in Part III, Section B of this paper.

106. Shaw, *supra* note 102, at 334; see also Pou, *supra* note 104, at 310-11 (noting that mediators have various styles and stating how that makes it difficult to develop a uniform standard of competency for mediators).

107. Shaw, *supra* note 102, at 339 (citing SPIDR: Society of Professions in Dispute Resolution—What is SPIDR?, available at <http://spidr.org/abt.htm> (last visited Aug. 31, 1998)); see also MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2 (2005), available at <http://www.mediate.com/pdf/ModelStandardsOfConductForMediatorsfinal05.pdf>.

108. *Id.* at 339 (citing Stephanie Harris, *Court-Connected Mediation of Parental Rights and Responsibilities in Ohio: The Impact of Interim Rule 81*, 10 OHIO ST. J. ON DISP. RESOL. 105, 109 (1994)).

109. See Harris, *supra* note 108, at 110. For example, certifying mediators, licensing mediators, or both would result in significant changes in mediation format and process—changes that would necessarily formalize mediation and limit its flexibility in the name of “standards.” See *id.*

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been developed by a coalition of professional mediator organizations, but professional certification of mediators has yet to be comprehensively addressed.¹¹⁰

B. Mediation Theory and Practice

In the United States, mediation is typically presented in contrast to other forms of dispute resolution.¹¹¹ The advantages of mediation over more adversarial options are typically organized around process and outcome goals and the relationship between the two: tailored outcomes, personal empowerment, and fairness are cited as process advantages while decreased time, expense, satisfaction with the outcome, and participant compliance are identified as substantive advantages.¹¹² Clearly, the interaction between the two sets of goals or advantages is significant, as well.¹¹³ Yet, while mediation theory remains oriented toward a value-free, norm-generating, participant empowerment model as the standard from which mediation is promoted, mediation's expansion into a growing number of fields has

110. Shaw, *supra* note 102, at 339-41. Organizations involved in creating the original 1994 guidelines include SPIDR, the Academy of Family Mediators, the Conflict Resolution Education Network, the American Bar Association, and the Association of Family and Conciliation Courts. The more recently formed Association for Conflict Resolution (ACR) which joined SPIDR with the Academy for Family Mediators (AFM) and the Conflict Resolution Education Network, formed a Mediator Certification Task Force that concluded mediators should have a minimum level of training and experience to work in the field and outlined a process for certification that also ensures diversity of practice and practitioners. Pou, *supra* note 104, at 312; see MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2. Despite broad approval of the Model Standards of Conduct for Mediators, only seven states currently provide grievance systems for participants dissatisfied with the quality of mediation or the ethics of their mediator. Paula M. Young, *Rejoice! Rejoice! Rejoice! Give Thanks, and Sing: ABA, ACR, and AAA Adopt Standards of Conduct for Mediators*, 5 APPALACHIAN J.L. 195, 233 n.234 (2006).

111. See Clay & Hoenig, *supra* note 93, at 10.

112. See GOLDBERG, ET AL., *supra* note 99, at 92.

113. See GOLDBERG ET AL., *supra* note 99, at 114-15 (citing JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 244-50, 260-63, 349-54 (1984)). Folberg and Taylor suggest that concerns about fairness tend to ignore the reality of litigation and its likely outcome for parties, pointing out that most civil actions are negotiated to settlement before reaching trial. See *id.* at 114. They mention, without fully incorporating, the fact that the adversarial process' checks and balances level the procedural playing field to a degree that mediation does not. *Id.* at 114. So while parties may enter litigation with vastly different resources at their disposal, rules of procedure, substantive law and precedent serve as guideposts throughout the litigation process and necessarily influence the settlement process, as well. See *id.* at 115.

resulted in methodological developments that challenge many of its traditional premises and goals.¹¹⁴

Three distinct types of mediation have become well established in mainstream mediation practice. The classic model, norm-generating mediation, encourages disputants to generate norms that will guide the resolution process and its outcome without reliance on, or even attention to, existing social norms.¹¹⁵ Norm-generating mediation is considered most appropriate where the particular outcome reached is deemed, by the mediator, less important than the parties' active participation in constructing and agreeing to abide by it.¹¹⁶ Such situations may arise when application of legal or social norms may not be "possible, sensible or conclusive."¹¹⁷

The second model, norm-educating mediation, posits that existing social norms are relevant to the mediation process and may enhance autonomy by enabling parties to make informed decisions.¹¹⁸ Norm-educating mediation evolved to address criticisms of norm-generating mediation as applied in divorce mediation.¹¹⁹ Court-referred mediation projects in the United States also rely on norm-educating mediation.¹²⁰ This model requires the mediator's active participation in ensuring the parties are educated and responsive to relevant social and legal norms, including local ordinance, state, and federal law. Norm-educating mediation purports to strike a compromise between practitioners who advocate a purely norm generating mediation model that excludes discussions of law and legal norms and critics who believe mediation is too far removed from established social norms, legal norms, or both to provide equitable outcomes to parties.¹²¹ The norm-educating mediation model is frequently used in employment discrimination cases as part of in-house dispute resolution programs¹²² and will be discussed in that context more fully below.

The third model, norm-advocating mediation, is less widely used than norm-educating mediation, but may be applied in environmental, zoning,

114. Waldman, *supra* note 30, at 704.

115. *Id.* at 718.

116. *Id.* at 720.

117. *Id.* at 720. For example, disputes between neighbors may be idiosyncratic conflicts stemming from poor communication, lack of communication, or misunderstandings with little or no foundation in legal or social norms. *Id.* at 722.

118. *Id.* at 731-32.

119. *See id.*

120. *See id.* at 733-34, for citations of numerous studies of court-referred mediation programs that apply this model to bankruptcy, real property, and wrongful termination disputes, among others.

121. *Id.* at 741.

122. *See* Howard A. Simon & Yaroslav Sochynsky, *In-House Mediation of Employment Disputes: ADR for the 1990s*, EMP. REL. L.J. 29, Summer 1995, at 29, 30-36.

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and some discrimination-related disputes.¹²³ Norm-advocating mediation is considered appropriate where a statutory mandate is in place. Although interest-based only insofar as the parties' interests are in alignment with their statutory rights, norm-advocating mediation attempts to draw parties together in situations where an ongoing relationship between them is either mandatory or highly desirable.¹²⁴ The Department of Justice, Environmental Protection Agency, and EEOC have all embraced mediation initiatives that "seek settlements which vindicate statutory norms"¹²⁵ and utilize some version of norm-advocating mediation in their "voluntary" settlement proceedings.

Against a backdrop of formal adjudicative processes that are time consuming and resource draining and often perceived as weighted in favor of the other party, mediation may seem an appealing alternative both to employers seeking to avoid costly litigation and lost productivity and employees seeking an end to injurious and already costly discrimination. But, does mediation fulfill its promise of resolving workplace discrimination claims in a forum that allows grievants to achieve fair and equitable resolutions?¹²⁶ Does the definition of *fair and equitable resolution* rely in some way on the resolution forum itself? Does the definition of *fair and equitable* change when the resolution forum is defined as, and designed to be, nonadversarial? What are the resolution and remedy implications for grievants who attempt to mediate their complaints?

IV. TESTING THE PROMISE OF MEDIATION

"What identity groups gain in defining their agenda they lose in

123. Waldman, *supra* note 30, at 746.

124. See *id.* at 752-53.

125. *Id.* at 751 (citing Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431, 486 n.301 (1996)). Professor Hodges also points out that, because mediated settlements will be reviewed by the agency for consistency with the governing statute, mediators must be well versed in both the statutes and their relevant application. Hodges, *supra*, at 486 n.301.

126. Harkavy, *supra* note 25, at 156-62. Professor Harkavy concludes that while there are certain disadvantages to mediating discrimination from the victim's point of view, they are outweighed by the advantages of confidentiality, empowerment, personal autonomy, and tailored remedies. *Id.*

carrying it out.”¹²⁷

“Both the promise and the myth of mediation is that it provides the opportunity for all parties to a dispute to ‘win.’”¹²⁸ “Where a dispute stems from poor communication and does not implicate subordination of important rights, or of social or legal principles, a process designed to facilitate compromise and ‘win-win’ outcomes can be of significant value”¹²⁹ “But disputes involving allegations of discrimination do implicate” legal rights and principles.¹³⁰ “So, what does the promise of mediation mean in the context of employment discrimination” complaints?¹³¹

A. Mediation Theory v. Practice in Employment Discrimination Cases

Because of the confidential and undocumented nature of most mediations, empirical data tracking applied mediation is difficult to obtain.¹³² However, some highly credible accounts by mediation practitioners offer insight into the dynamics employees who mediate claims of employment discrimination are likely to face.¹³³

People who experience harassment or other discrimination at work generally want (1) the offensive conduct to stop, (2) assurances that the conduct will not reoccur, (3) assurances that others will not be treated similarly, (4) protection from retaliation, and (5) the ability to regain the type of work environment they had prior to experiencing the offensive

127. Daniel R. Ortiz, *Self-Defeating Identities*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 371, 374 (Robert Post & Michael Rogin eds., 1998). Ortiz makes the disturbing point that identity politics proves a bind for minority groups in that it only allows them access to privileges the majority grants for itself at the expense of denying that which is distinctive about the minority group. *Id.* Because identity politics essentially levels the playing field for majority and minority identities, it sets up intergroup relations in the manner of “international relations” between sovereign states, thereby ensuring the maintenance of majority rule. *Id.* Mediation, therefore, will serve to maintain the status quo rather than facilitate structural change necessary to curtail workplace discrimination. *Id.*

128. Hippensteele, *supra* note 39, at 63.

129. *Id.* “[I]n the business world, conflicts may stem from poorly planned commercial transactions and the inability to find a compromise solution could result in greater financial harm to both parties.” *Id.*

130. *Id.* at 63-64.

131. *Id.* at 64.

132. CONLEY & O’BARR, *supra* note 26, at 57.

133. See generally Silver, *supra* note 14 (using examples to weigh the benefits of mediation as an informal process for handling civil rights claims); CONLEY & O’BARR, *supra* note 26 (relying on isolated case studies and sociolinguistic analytical methods but grounding their contextual critique of mediation in their own work experiences); Grillo, *supra* note 27 (discussing examples of the role of and affect upon women in the mediation process).

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conduct.¹³⁴ These rights-based resolution objectives reflect concerns about retaliation and job loss that often compel those targeted by discriminatory conduct in the workplace to seek assistance in the first place.¹³⁵ Mediation theory posits that properly practiced mediation offers victims of discrimination the best chance of attaining their resolution goals by providing them the opportunity for tailored outcomes fair to both parties, personal empowerment, decreased time and expense, and participant compliance.¹³⁶ Bolstered by the argument that traditional adversarial processes such as litigation and formal complaint resolution mechanisms fail to provide a forum for addressing the hurt and anger that result from the victim's experience,¹³⁷ mediation theory also emphasizes that a mediation forum enables victims to resolve these feelings.¹³⁸ Because mediation is posited as a resolution option in which both the process and outcome are controlled by the parties, the complaining party should, in theory, be able to obtain a better outcome than submitting to the adversary system's structure and relying on precedent.¹³⁹

134. See Hippensteele, *supra* note 39, at 56 (citing Howard Gadlin, *Mediating Sexual Harassment*, in *SEXUAL HARASSMENT ON CAMPUS* 186, 189 (Bernice R. Sandler & Robert J. Shoop eds., 1997) (suggesting that most victims of sexual harassment want their story to be believed and to protect their privacy and reputation)); *see also* *Ford Motor Co. v. Equal Employment Opportunity Comm'n*, 458 U.S. 219, 230 (1982) (stating that securing and maintaining employment are the primary motives of employees filing employment discrimination complaints); KOPPELMAN, *supra* note 37, at 8, 24-26, 77, 92-93; Harkavy, *supra* note 25, at 156-57.

135. See Jeanette Cleveland & Kathleen McNamara, *Understanding Sexual Harassment: Contributions from Research on Domestic Violence and Organizational Change*, in *SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES* 217, 235-36 (Margaret S. Stockdale, ed., 1996).

136. GOLDBERG, ET AL., *supra* note 99, at 92.

137. Harkavy, *supra* note 25, at 158; *see also* CONLEY & O'BARR, *supra* note 26, at 67 (reviewing narrative structure of legal accounts involving post-trial interviews with trial witnesses). The authors argue that witness perceptions of being unable to tell their story at trial are linked to their reliance on "everyday storytelling habits" and discomfort with the constraints of courtroom "rule-oriented," sequential narration norms. *Id.* Professors Conley and O'Barr suggest that findings such as these support, not just the creation of alternate or "resistant" opportunities for dispute resolution, but a "revolutionary transformation" of the current adversarial process. *Id.* at 75-77.

138. By its very existence, this particular antiformalism argument prioritizes "hurt" and "anger" among the various injuries that accompany workplace discrimination. This point will be addressed in more detail below.

139. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 42 (1996). Professor Sunstein's argument that incomplete theorization is well adapted to a system that relies on precedent is instructive. He suggests that abstractions are necessary components of the adversary system's commitment to precedent as a mechanism for maintaining civility and reciprocity and that they allow the process of progress without posing challenges to a litigant's "deepest and most defining

The question remains, though, whether mediation can provide those alleging workplace discrimination with meaningful assurance of an end to the discrimination or assurance that other rights-based resolution goals can be met. Inherent in mediation theory's emphasis on relational, rather than rights-based, outcomes are several underlying assumptions: (1) what the complaining party needs most is to move beyond the experience; (2) mediation is the best forum through which the "moving beyond" process can occur; (3) the respondent party will enter the mediation in good faith and will treat the victim in a manner wholly unlike that which she or he is currently grieving; (4) the mediator will simultaneously maintain neutrality while guiding the parties through the resolution process; and (5) the mediator will exhibit none of the biases, assumptions, or stereotypes that contribute to the risk the formal adversary system poses for victims of discrimination. The remainder of this section examines the first three of these assumptions while the fourth and fifth will be taken up in the following section addressing the role of the mediator.

What the complaining party needs most is to move beyond the experience. On its face, this assumption appears to be noncontroversial. Certainly, few would argue that an individual who has suffered discrimination at work wants and needs to resolve the matter and to refocus time and energy toward more pleasant pursuits. However, the moving beyond outcome is difficult for many to achieve and is rarely possible until certain rights-based resolution objectives are met.¹⁴⁰ For example, fear of retaliation from a perpetrator or employer remains, for many victims of workplace discrimination, long after a "resolution" has been concluded. Similarly, an employee who lost significant work time as a result of the discrimination may later experience difficulty obtaining promotion or productivity related benefits. Furthermore, subtle changes in workplace interactions between the victim and coworkers following resolution of an employment discrimination case may be a continuing reminder of the experience. These and other effects may follow a claimant for weeks or even years after the discriminatory conduct ends. While such fears and effects may be raised during mediation, the notion that the mediation process itself can, or will, provide the claimant with what is required to move beyond the experience of discrimination through its emphasis on relational

commitments." *Id.* at 40. It is interesting to note that mediation's claim of increased fairness and opportunity for equitable resolution relies on its ability to address the fact-based harm Sunstein suggests make parties less likely to experience the process as engendering reciprocity and mutual respect. *See id.* at 40-41.

140. *See* Grillo, *supra* note 27, at 1569.

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goals masks the importance and complexity of *implementing* agreed upon remedies.¹⁴¹

Mediation is the best forum through which the moving beyond process can occur. Mediation literature is ripe with reference to the importance of maintaining positive professional relationships and “redirect[ing] emotions in a productive manner.”¹⁴² Claimants are often described as needing an opportunity to vent anger and express frustration before being able to “move on” to dispute problem-solving.¹⁴³ However, even accepting this questionable pseudopsychological premise as true, mediation may not provide the “safe” and “comfortable forum”¹⁴⁴ for addressing and resolving feelings of frustration and anger that ADR proponents suggest.

It is often presumed “that being emotional and being rational are mutually exclusive states of mind.”¹⁴⁵ As the late Professor Trina Grillo pointed out in her comprehensive and influential work on mediating divorce, negative emotions such as expressions of anger are frequently *discouraged* during mediation, especially when expressed by women.¹⁴⁶ Professors Conley and O’Barr have similarly shown that, because “cooperation is the highest normative value” in mediation,¹⁴⁷ expressions of anger or frustration that *are* allowed to be heard in the mediation context are typically denigrated, labeled “counterproductive” to the goals of compromise and ultimately, consensus, or both.¹⁴⁸

141. See Wittenberg et al., *supra* note 41, at 751, for the suggestion that the “expeditious” resolution mediation provides allows both “employees and employers alike to put the incidents behind them and get on with their lives.”

142. Harkavy, *supra* note 25, at 158; *see also* Wittenberg et al., *supra* note 41, at 750.

143. Wittenberg et al., *supra* note 41, at 750.

144. Harkavy, *supra* note 25, at 156.

145. Hippensteele, *supra* note 39, at 61 (discussing the risks of being perceived as “emotional” in the workplace) (citing GEORGE E. MARCUS ET. AL., WITH MALICE TOWARD SOME: HOW PEOPLE MAKE CIVIL LIBERTIES JUDGMENTS 10-11 (1995)).

146. Grillo, *supra* note 27, at 1572-73. Professor Grillo makes a strong case that among women, the sanctions imposed for expressions of anger correlate with race and ethnicity, with black women experiencing the most dramatic pressure to modulate or suppress their anger. *See id.* Grillo makes equally clear that the expressions of anger legitimized through the adversary system are not wholly without problems since they are often expressed not by the parties but by their representatives and it is often not the “actual anger that is being expressed, but rather the anger the party is expected to have.” *Id.* at 1573.

147. CONLEY & O’BARR, *supra* note 26, at 58.

148. *Id.* at 50. The authors draw disturbing conclusions from their review of the micro discourse of mediation literature. *Id.* They point out that, while mediation is designed to equalize power between parties to a dispute, the more competitive party will be most advantaged by the process *because* of the emphasis on cooperation and relational goals. *Id.* The party whose personal

What does seem clear from the literature is that mediation, by emphasizing personal empowerment through emotional exchange and processing, translates a discourse of rights through which healing follows remedy and restitution into a discourse of healing, radically redefining the fair and equitable remedy in the context of employment discrimination.

The respondent party will enter the mediation in good faith and will treat the victim in a manner wholly unlike that which she or he is currently grieving. Much has been written about the desirability of mediation from the perpetrator or employer perspective.¹⁴⁹ Employers, in particular, place a premium on the confidentiality mediation provides, particularly when an employment dispute involves allegations of discrimination that could disrupt workplace morale and affect the reputation and productivity of a business.¹⁵⁰ Some employers also fear that nonconfidential proceedings might encourage additional complaints.¹⁵¹

It is important to recognize that procedures emphasizing relational, as opposed to rights-based outcomes, may decrease the likelihood of grievants achieving what the law entitles them to.¹⁵² Both the process and outcome goals of mediation in the employment context prioritize “creative” over substantive resolutions and mitigating, rather than correcting, injury and inequity that are the substance of the employee’s claim.¹⁵³ When considering issues of procedural fairness, mediation cannot be viewed in isolation from other available options.¹⁵⁴ Not only must mediation be one among a number of *viable* options in order for it to be reasonably considered voluntary, other procedures must be available should the mediation fail to effectively resolve the problem an employee is experiencing.¹⁵⁵ Further, if a

style or position makes them more facilitative will be more likely to compromise and may concede important points in the interest of cooperation rather than fairness. *Id.* The claimant is more likely to be the less competitive party in employment discrimination cases. *Id.* See also, Deborah Henshaw Urbanski & Gloria M. Portela, *Workplace Mediation: Are You Helping or Hindering?* 70 TEX. B. J. 582, 583 (2007). Urbanski, supervisory general attorney-ADR coordinator for the Houston District Office and the New Orleans Field Office of the EEOC, and Portela, a private mediator, warn advocates not to confuse emotionally charged behavior with irrationality or to suspect exaggeration of a claim. *Id.* They further advise that, when advocates act defensively in the face of emotion from the other party, they may disadvantage their own client by providing the other party with opportunity to engage in prejudicial conduct. *Id.* at 582-583.

149. See Wittenberg et al., *supra* note 41, at 750.

150. *Id.*

151. *Id.* This point will be addressed further below, in comparing the utility of confidential/individual with public/communitarian responses to employment discrimination.

152. Silver, *supra* note 14, at 526.

153. *Id.*

154. *Id.* at 526-27.

155. See Rowe, *supra* note 65, at 270; Gadlin, *supra* note 134 (discussing the various aspects of the contextual background of a complaint that must be taken into account before and during an

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mediated agreement is later breached, enforcement mechanisms must be in place to hold a respondent accountable for the breach. If a breach requires an investigatory process to begin anew, unenforceability significantly undermines the value of the mediation option.¹⁵⁶

Retrospective and prospective remedies pose very different enforcement problems for mediation. A negotiated agreement dealing primarily with retrospective remedies may be relatively easy to enforce. However, agreements that incorporate prospective remedies such as changes in hiring or promotion practices, an end to harassment or retaliation against a complaining party or witnesses, or other remedies that require ongoing monitoring may prove extremely difficult to enforce.¹⁵⁷ Further, while few employers will enter into a mediated agreement with an employee they consider to be causing problems or raising spurious allegations of discrimination,¹⁵⁸ an inevitable problem with mediation is that one cannot know the actual value of a negotiated agreement as measured against applicable laws without knowing the strengths and weaknesses of a particular case.¹⁵⁹

Even this brief treatment of areas in which mediation theory and practice diverge suggests there is distance between the theorized process of mediation deemed to be of such value to parties—particularly the grievant who is presumed to benefit from being able to articulate the harm and injury the party has experienced—and the actual outcome of mediation.¹⁶⁰

B. The Role of the Mediator Revisited

Although ethical codes and guidelines for certification of mediators were first published in 1994, their use is not standardized across the

attempt at informal resolution); Calhoun, *supra* note 32, at 216-17 (explaining that having a “clear sense of alternatives to the mediations process empowers any mediation participant,” and pointing out that it is the mediators ethical obligation to ensure that the employee is fully informed of her or his exit options, including litigation).

156. Cf. Rowe, *supra* note 65, at 270.

157. See generally Silver, *supra* note 14, at 523-24.

158. See Wittenberg et al., *supra* note 41, at 752.

159. Silver, *supra* note 14, at 544.

160. See generally CONLEY & O'BARR, *supra* note 26, at 57-58 (discussing outcome data from divorce mediation that suggests women, particularly those with children, fare worse in terms of financial, property and child support outcomes through mediation than litigation); Grillo, *supra* note 27, at 1605 (finding that mediation reinforces powerlessness in parties for whom past abuse of power has been an element of their experience).

profession, and mandatory rules for mediator conduct or evaluation throughout the United States still do not exist.¹⁶¹ In some cases, implemented codes contradict one another, and some establish standards that are internally inconsistent.¹⁶² Perhaps the most glaring inconsistency is the “simultaneous recommendation that mediators promote disputant autonomy while ensuring that mediated agreements are fair according to societal norms.”¹⁶³ Standards have not provided a mechanism for assessing “fairness” of the agreement.¹⁶⁴

The mediator will simultaneously maintain neutrality while guiding the parties through the resolution process. In her comprehensive examination of the role social norms play in mediation process and mediator practice, Professor Waldman concludes that the inherent contradictions between the central premises and goals of mediation and its practice reflect an ever widening gap between mediation as developed for, and applied in, business and labor settings and mediation as it has evolved through practice in the “trenches” of employment discrimination.¹⁶⁵ Because mediator neutrality has long been the defining feature of mediation, and the characteristic implicitly and explicitly linked to the “fairness” of mediation outcomes, the interplay between mediation’s expansion into a broad range of fields and the changing role of mediators has caused some difficulty in the field¹⁶⁶—particularly for proponents of mediation. There have been relatively few published efforts to document or to systematically critique the effects of changes in mediator methodology.¹⁶⁷ Yet, even a brief foray into the

161. See Waldman, *supra* note 30, at 765; Young, *supra* note 110. See generally Pou, *supra* note 104, at 312 (discussing various quality assurance initiatives for mediation).

162. See Waldman, *supra* note 30, at 765; Young, *supra* note 110, at 207-08.

163. Waldman, *supra* note 30, at 765-66. Waldman cites the American Arbitration Association (AAA), the American Bar Association (ABA), and the Society of Professionals in Dispute Resolution (SPIDR), which set “disputant self-determination” as a primary goal of mediation while entreating mediators to ensure the mediated agreement is fair to parties both present and absent from the mediation. *Id.* The Illinois Code goes so far as to encourage mediators to “disassociate” themselves from agreements they do not consider to be fair and reasonable to all parties. *Id.* at 766.

164. *Id.* at 766. Professor Waldman quotes the Illinois Code as citing “case precedent, legal requirements, and learned common sense” as the proper criteria a mediator should consider in determining whether a mediated agreement is fair. *Id.* See also MODEL STANDARD OF CONDUCT FOR MEDIATORS 6 (2005) (stating that mediation should be performed with fairness without defining what constitutes fairness).

165. See Waldman, *supra* note 30, at 768.

166. *Id.* at 704-05.

167. See *id.* at 704-05; CONLEY & O’BARR, *supra* note 26, at 57. One notable exception is Susan Nauss Exon’s recent analysis of mediator styles that thoroughly documents not only the definitions of mediation and the role of mediators but also the development of ethical codes and the lack of standard expectations for mediator and process “impartiality” and “neutrality.” Susan Nauss

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sociolinguistic literature on the issue suggests that with norm-educating and norm-advocating mediation styled interventions replacing norm-generating mediation in mainstream mediation practice,¹⁶⁸ the “neutral” mediator may be little more than an element of the “mythic frame” that has long provided mediators direction and inspiration.¹⁶⁹ One study of contemporary mediation practice in employment cases has suggested the role of the neutral may simply be part of the “attractive vision” mediators use to promote their craft.¹⁷⁰ A growing body of scholarship is emerging that suggests the role of the “neutral mediator” should be reexamined altogether.¹⁷¹

In their recent treatment of mediation in the context of language and legal discourse, Professors Conley and O’Barr make two particularly compelling points about the role of the mediator. First, they address the claims that mediators are neutral and that the mediation process is benign is a political one.¹⁷² Mediation, as a *linguistic* process, restructures communication by altering conversation structure and the “moral environment” of everyday argument, thereby influencing the actual content and scope of a mediated dispute.¹⁷³ Second, they state that mediation is a way of talking about disputes and mediators are players in a political contest for dominance between “alternative” and “adversarial” discourses in the field of dispute resolution.¹⁷⁴ The alternative discourse promotes dispute

Exon, *The Effects That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. REV. 577 (2008).

168. Waldman, *supra* note 30, at 707-08.

169. *Id.* at 757.

170. *Id.* Critics of mediation have often questioned the claim of mediator neutrality. See, e.g., Katherine V.W. Stone, *Procedural Justice in the Boundaryless Workplace: The Tension Between Due Process and Public Policy*, 80 NOTRE DAME L. REV. 501, 517 (2005).

171. See Calhoun, *supra* note 32, at 208-12. Professor Calhoun makes a convincing argument that the integrity of the mediation process requires a mediator to take an active role at the first phase caucus stage to cultivate what amounts to a virtual group presence that will help frame the claimant’s issues and remedies and ensure her or his exit options remain open. See *id.* See also Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 19 (2004); John M. Livingood, *Reframing and Its Uses*, DISP. RESOL. J., Nov. 2002-Jan. 2003, at 42; Robert Robinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833 (2004).

172. CONLEY & O’BARR, *supra* note 26, at 40.

173. See *id.* at 40-46.

174. *Id.* at 46. Conley and O’Barr point out that “[s]ince dominant discourses are translated into social action . . . the outcome of the contest is not a mere theoretical concern.” *Id.* Drawing on the work of Trina Grillo and Martha A. Fineman, the authors show that the discourse of mediation actively alters the conversational structure and context of argument and defuses confrontation between the parties. *Id.* at 45-46. By decoupling accusations and denials and requiring the parties to

resolution reform designed to substitute goals and values of the “helping professions” for traditional legal concepts such as rights, responsibility, and fault.¹⁷⁵ Subsequently, as a *macro discourse*, mediation not only influences which resolution options are promoted by the dispute resolution industry,¹⁷⁶ but it also influences which disputant will win and which will lose.¹⁷⁷

The mediator will exhibit none of the biases, assumptions or stereotypes that contribute to the risk the formal adversary system poses for victims of discrimination. The belief that the formality of traditional litigation deters bias and results in certain advantages for members of disempowered groups has been promoted by legal theorists and supported by empirical research.¹⁷⁸ Professor Richard Delgado has argued that, given the human tendency to conform, rules of procedure and evidence and normative expectations for manner and mode of communication in the courtroom encourage distance between the parties and their counsel that resulting behavior reflects higher public values of “fairness, equality, and respect for personhood.”¹⁷⁹ Clear

speak with the mediator rather than each other, the mediator imposes a normative order which influences the content, parameters, and tone of the dispute, ultimately influencing who wins and who loses. *Id.* at 46-50.

175. *Id.* at 46. Professors Conley and O’Barr draw heavily from the work of Martha Fineman who examined the rise of mediation and its impact on divorce outcomes for women. Fineman characterized values employed by the helping professions to “reform” traditional legal discourse pertaining to divorce as “the equality ideal.” *Id.* at 46-49. According to Fineman, this set of values was promoted in the 1960s and 1970s to attack gender-biased divorce and child custody practices employed by the courts. *Id.* at 46-47. With the introduction of “no fault” divorce, a theory promoted by liberal reformers as a means of challenging the presumption that women are economically dependant and require alimony or other post-divorce assistance, the starting point for adjudicating divorce cases became what Fineman calls the “illusion of equality.” *Id.* at 47. Prior to this period, the traditional legal concepts of rights, responsibility and fault served as guideposts for child custody determinations and property distribution. *Id.* at 46-47. Under current law, men and women have equal earning capacities, willingness and ability to care for children, access to social and professional networks, and so on. *See id.* at 47-49. Fineman’s analysis of changes in divorce law, practice and outcome also documented the fact that, economically, women and children have been significantly harmed by divorce “reform,” illuminating the role of the helping professions in promoting symbolic over economic reality. *See* MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991).

176. “Dispute resolution industry” includes neighborhood justice centers, ADR programs in the public and private sectors, the courts, attorneys in private practice, and the growing number of ADR/conflict resolution programs within academic institutions.

177. *See* Exon, *supra* note 167, at 600. In her analysis of the role of mediator Professor Exon points out that the field of mediation is evolving and the definition of mediation must evolve and expand to encompass all current styles of mediation and mediators. *See id.* at 578-79. She advocates removal of requirements of mediator impartiality other than conflict of interest concerns. *Id.* at 620.

178. *See* Delgado et al., *supra* note 31, 1388-89.

179. Hippensteele, *supra* note 39, at 61 (quoting Delgado et. al., *supra* note 31, at 1388) (discussing the myth that litigation of sexual harassment and discrimination disadvantages grievants).

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legal principles may also help grievants in workplace discrimination cases to define injury in a context where the assertion of legal rights is legitimate and potentially transformative.¹⁸⁰

Delgado's hypothesis has support from social scientific studies on decision-making and emotion. Research has shown that while personality type and level of education strongly correlate to political tolerance in decision-making, even individuals who display strong support for general principles of democracy (e.g., judges and members of the bar) and agree with the specific principle of minority rights may not apply these principles to members of unpopular groups.¹⁸¹ There is additional evidence that, among those prone to intolerance for assertion of rights by minority or oppressed groups (certainly some judges and members of the bar will fall within this category, as well), the perception of threat in the form of evidence that a member of that group has behaved in an objectionable way (e.g., by expressing anger or frustration) *increases* the likelihood of intolerant decision-making and action.¹⁸²

Proponents of alternative resolution processes argue that the basic problem with relying on the formal adversary system for redress in discrimination cases is that many of the harms experienced by employees who allege discrimination at work have never been codified by the courts and so remain invisible and incomprehensible within that system.¹⁸³ This argument goes on to partly, but significantly, suggest that, because the judiciary is made up of a relatively small group of social elites and is not

180. See Grillo, *supra* note 27, at 1558-60, 1565, for a discussion of how clear legal principles help define injury in the context of divorce by comparing formal adjudication and mediation. Grillo specifically identified the traditional adversarial litigation process as the more potentially effective means for addressing fault and redressing past injury. See *id.* at 1549.

181. MARCUS ET AL., *supra* note 145, at 27.

182. *Id.* at 221. The authors suggest that the more threatened people feel, the less tolerant they are. *Id.* For example, individual A believes that affirmative action has accomplished its goals and that women and racial minorities *generally* are seeking to use the remnants of existing affirmative action policies to obtain undeserved personal gains in the workplace. See *id.* Individual A is likely to feel intolerant of a woman or racial minority alleging discrimination in retention or promotion practices of the employer. See *id.* If the employee expresses anger, frustration, impatience, or even a high level of professional competence, individual A is likely to feel threatened; intolerance is likely to influence her judgments of, and behavior toward, individual A. See *id.*

183. See Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will Be Corrupted: Pornography as Speech and Product*, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA AND PORNOGRAPHY* 240, 245 (Laura J. Lederer & Richard Delgado eds., 1995).

politically accountable,¹⁸⁴ individual judges may act on biases, stereotypes, and negative assumptions with impunity.¹⁸⁵ What is unclear from the literature addressing this argument is the basis for the oft-stated proposition that mediators (who may well be retired judges), tasked with moving disputants through a process in which they play a tremendously influential and flexible role and faced with numerous opportunities to steer the mediation toward a preferred outcome, will not act on individual biases, stereotypes, or negative assumptions they also hold.¹⁸⁶ As Professors Conley and O'Barr point out, it is difficult to determine exactly how mediator bias affects the process and outcome of mediation, but the notion that mediator bias *does* systematically influence the outcome of mediation has received considerable empirical support.¹⁸⁷

C. Liberalizing the Workplace

Stirred by conservative rhetoric that rejects class struggle while promoting class-based versions of affirmative action to replace those designed to remedy the effects of race, ethnicity, sex, or gender discrimination, many liberal supporters of traditional affirmative action have found common ground with political conservatives, supporting preferential treatment based on low income and disadvantaged social environment.¹⁸⁸ And, drawing influence and momentum from recovery psychology, champions of identity politics have incorporated victim rights talk into their

184. Mary Becker, *The Legitimacy of Judicial Review in Speech Cases*, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA AND PORNOGRAPHY* 208, 213 (Laura J. Lederer & Ricard Delgado eds., 1995). Becker, in fact, argues that binding judicial review insulates decisions that harm the interests of increasingly visible and numerically powerful constituency groups, such as sexual and racial minorities, from the political process (i.e., corrective legislation). *Id.*

185. *See id.* This argument would seem to suggest a different strategy altogether for responding to systemic flaws in process available for formally adjudicating Title VII claims. Rather than relying on alternatives to existing dispute resolution processes, it appears to support legislative efforts to codify injury and strengthen enforcement of existing (or previously existing) nondiscrimination statutes.

186. It is important to note that many prominent mediators and ADR specialists are attorneys in private practice (who at least arguably fall within the potential candidate pool of "social elites" available for judicial appointment) and an increasing percentage of mediators in many organizations are retired judges. Although unstated, the proposition seems necessarily to rely on mediators not carrying any biases, stereotypes, or negative assumptions—a wholly unrealistic assumption.

187. CONLEY & O'BARR, *supra* note 26, at 57.

188. *See* Michael Feher, *Empowerment Hazards: Affirmative Action, Recovery Psychology, and Identity Politics*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 175, 175-79 (Robert Post & Michael Rogin eds., 1998).

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equal rights agenda with renewed vigor.¹⁸⁹ Not surprisingly, the “new psychological framework” of identity politics in the United States has made the discourse less threatening to conservative goals and agenda than it was in the early 1990s.¹⁹⁰ In fact, privileging subjective experience has become a prime strategy of the new Right as the “angry white man” embraces his new-found authority to define the harm that affirmative action (reverse discrimination), women’s empowerment and rise in workplace stature, and “politically correct” discourse have brought to bear on his self-esteem.¹⁹¹ Proponents of race and gender conscious politics now vie for position in a political structure where the victim of racism and the victim of an absent father are deemed to be articulating equally legitimate claims to suffering.¹⁹² Caught in a complicated web of personal empowerment discourse and affirmative action backlash, political liberals have embraced individual struggles against discriminatory treatment to serve the purpose of promoting their vision of color-blind and gender-blind workplaces, implicitly rejecting communitarian efforts that could ensure disability, race, ethnicity, sex, gender, and other identity vectors remain prioritized on the diversity radar screen.¹⁹³

ADR generally, and mediation specifically, fit neatly within the liberal scheme for achieving a color-blind and gender-blind workplace. The rhetoric of individual rights and personal empowerment conform to the overarching goals of ADR and the procedural and substantive objectives of mediation. Because affirmative action has been endorsed by liberals as “temporary compensation leading to equal opportunity” rather than a “permanent commitment to actual diversity,”¹⁹⁴ promotion of mediation as a response to workplace discrimination is embraced by liberals who view it as a sign that people of color, sexual minorities, and women have arrived and

189. *Id.* at 179. Professor Feher makes a strong argument that the University of California Board of Regents’ July 1995 decision to base preferential hiring and admissions decisions on low income level and underprivileged social environment has its roots in popular psychology and principle doctrines such as Alcoholics Anonymous. *Id.* at 175-76.

190. *Id.* at 180.

191. *Id.* at 179.

192. *Id.* at 179-80. Professor Feher contextualizes his argument by pointing out that the emergent pride of the deserving victim and its result makes establishing an objective hierarchy of victimization impossible. *Id.*

193. *Id.* at 183.

194. *Id.* at 182-83.

now have a “place at the table.”¹⁹⁵ Impervious to the stark contrast between mediation’s theoretical goals and promise of empowerment and the realistic implications of the models actually employed by mediation practitioners, proponents of mediation have failed to identify or fully account for its inadequacies. As a result, mediation has become, not one among a number of equally accessible, albeit differently burdensome, discrimination response options, but the preferred option. But questions remain: Mediation is preferred by whom? And, why is it preferred?

The adversarial process, posited in the United States as “rational, devoid of emotion, self-interested, and instrumental (result-oriented),”¹⁹⁶ has pit rights-based resolution objectives against relational ones. Mediation, as a process in which “feelings can be expressed,” implicitly subsumes rights-based objectives within mediation discourse by coding them as empowerment, fairness, and healing.¹⁹⁷ There is scant reference to, let alone emphasis on, mechanisms that enable a mediator to ensure the rights-based objectives of a Title VII grievant will be met through the mediation process.¹⁹⁸ Critics of mediation, supported by a growing body of empirical data, have suggested that mediating disputes involving allegations of discrimination or abuse of power effectively masks rights-based objectives altogether.¹⁹⁹

Former New York City district attorney Alice Vachss, who worked the sex crimes detail in that city for many years, wrote that “[c]ollaboration is a hate crime” manifest through political “aid and comfort” discourse promoted

195. See BRUCE BAWER, *A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY* 31, 35-36 (1994), which departed from earlier calls to action by gay activists by calling for individualism over collectivism. Bawer, an openly gay Christian conservative cultural critic, distances himself from the vocal “minority” of gay activists and places a call for “reason over irrationality, acceptance over estrangement [and] love over loathing.” *Id.* at 15. While making a claim for substantive equality in the form of domestic partnership, Bawer links progressive efforts by gay activists to achieve the full range of legal protections for sexual minorities with antigay efforts to ensure that sexual minorities remain ghettoized. *Id.* Bawer’s book has been touted by many (presumably straight-identified) reviewers as a “crossover” book that should be the starting point for future discussions of gay rights in the United States.

196. Grillo, *supra* note 27, at 1572.

197. *See id.*

198. *See* Gadlin, *supra* note 134, at 189 citing the following goals as priorities among victims of discrimination: (1) the offensive conduct must stop, (2) grievant must receive assurances that the conduct will not reoccur, (3) grievant must receive assurances that others will not be treated similarly, (4) grievant must receive protection from retaliation, and (5) grievant must retain the ability to regain the type of work environment she or he had prior to experiencing the offensive conduct.

199. *See, e.g.,* Grillo, *supra* note 27; Waldman, *supra* note 30; Delgado et al., *supra* note 31. *See also* FINEMAN, *supra* note 174, for a discussion of mediation in the context of divorce and child custody.

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as social reform, legal reform, or both.²⁰⁰ In the sexual harassment arena, Joan Kennedy Taylor has argued efforts to enforce Title VII compliant sexual harassment policies through litigation assume “women are, by definition, passive victims who require government help.”²⁰¹ Taylor concluded that “major changes to cut back [sexual harassment laws] are necessary, in the interests of women.”²⁰¹

Similar, albeit more subtle, psychologically based arguments are at the heart of many pro-ADR arguments advanced by “equity and fairness” advocates. Professor Michael Yelnosky suggests that efforts toward Title VII reform and enforcement suffer from misguided reliance on the “ability of courts and juries to understand and remedy complex problems” of contemporary discrimination.²⁰² He argues for a “facilitative-broad” approach to mediating discrimination claims that emphasizes both parties’ individual interests *rather than* focusing on parties’ legal rights and responsibilities.²⁰³ Sturm has suggested that “[r]ules proscribing intentional discrimination will not reach much of the behavior that produces identity-based exclusion.”²⁰⁴ She points out that prevailing legal paradigms have not kept up with the changing dynamics of workplace discrimination and do not reflect the results of psychological and organizational research.²⁰⁵ While

200. ALICE VACHSS, *SEX CRIMES* 278-79 (1993). An earlier example of Vachss’ charge can be seen in the work of Deborah Gartzke Goolsby, who argued for mediation rather than prosecution for cases of “simple” (i.e., acquaintance) rape. See Deborah Gartzke Goolsby, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183, 1184 (1990).

²⁰¹ JOAN KENNEDY TAYLOR, *WHAT TO DO WHEN YOU DON’T WANT TO CALL THE COPS: A NON-ADVERSARIAL APPROACH TO SEXUAL HARASSMENT* (1999).

201. *Id.* at 7. Taylor supports her conclusion by arguing that the workplace is a “male” environment and women, in order to be accepted as colleagues and equals by men, must modify their expectations to allow men to treat women as they treat one another. *Id.* She suggests that when men treat women as they treat other men, women often cry sexual harassment. *Id.* She argues that while we should object to sexual extortion, hostile environment sexual harassment laws stymie, rather than promote, women’s rights in the workplace. *Id.*

202. Yelnosky, *supra* note 23, at 592.

203. *Id.* at 601. Yelnosky calls for an approach to mediating employment discrimination claims that incorporates collective action in the form of caucus groups. *Id.* at 586. Interestingly, he points out that such an approach will require no insignificant changes in Title VII law pertaining to retaliation, as well as changes to current labor law and practice, in order to be viable. *Id.*

204. Sturm, *supra* note 37, at 673. Sturm cites the case of Maivan Lam, an applicant for the position of director of the Pacific Asian Legal Studies program at the University of Hawai’i Law School, as an example of this problem. *Id.* at 668 n.93. She points out that while the court found the law school’s selection process for the position discriminatory, absent evidence of individual bias by high level administrators, no individual discrimination could be found in the case. *Id.*

205. *Id.*; see also Pollard, *supra* note 31, at 929-30.

Sturm does *not* make an explicit call for mediation per se, she does conclude that litigation cannot address the underlying sources of workplace discrimination or enable employers to proactively address problems of discrimination.²⁰⁶ She calls, instead, for an approach that encourages “constructive conflict [between or within groups] that produces organizational learning.”²⁰⁷

The discourse of personal empowerment is at odds with the purported advantages of mediating discrimination claims in several significant ways. First, the mediation literature is replete with references to its appeal for those seeking confidentiality and a desire not to publicly reveal the “intimate and embarrassing details of conduct” these same individuals experienced.²⁰⁸ Second, while the mediation environment is consistently described as safer, more comfortable and more facilitative for victims of discrimination,²⁰⁹ mediation outcomes do not provide formal protections against further discrimination or retaliation.²¹⁰ Third, adaptability of the process and flexibility of outcomes, both cited as primary advantages of mediation for grievants,²¹¹ ignore the risk a flexible process that mandates compromise creates for the targeted individual. Fourth, the inherently private nature of mediation, while offering a Title VII claimant a confidential resolution, wholly negates the possibility of public vindication.²¹² Finally, and perhaps most significant from the standpoint of this article, mediation, as a preferred option for resolving Title VII claims, impairs the orderly development of Title VII jurisprudence²¹³ and ensures that individual cases of employment discrimination will not address group injury or become catalysts for stronger laws and more effective enforcement of Title VII.

V. CONCLUSIONS AND IMPLICATIONS

“[I]nformalism inhibits social change by persuading disputants with legitimate grievances to sacrifice their grievances in the interests of

206. Sturm, *supra* note 38, at 675.

207. *Id.* at 674.

208. See Harkavy, *supra* note 25, at 157, for a discussion of confidentiality and other arguments promoting mediation as the preferred mechanism for handling employment discrimination disputes.

209. See *id.* at 156-61; Shaw, *supra* note 102, at 335; Clay & Hoenig, *supra* note 93, at 10.

210. See Silver, *supra* note 14, at 523-24.

211. Harkavy, *supra* note 25, at 158.

212. *Id.* at 161.

213. *Id.*

peace and cooperation."²¹⁴

The distance between mediators' beliefs about what grievants need from mediation and what meaningful and just outcomes grievants actually prefer raises serious questions about voluntariness of mediation for discrimination cases. Citing Richard Abel's powerful critique of informalism reinforcing authoritarian social forces, Delgado and colleagues cast ADR and mediation as forces that neutralize and inhibit rather than promote fairness and equality.²¹⁵

There are inherent contradictions in assuming the neutrality of a mediator. In a political climate where right-wing leaders "claim the 'benefits' of victimization for their own constituencies,"²¹⁶ mediation's cloak of neutrality appropriates the privilege of subjective experience, effectively masking relevant and pernicious hierarchies of race, ethnicity, sex, gender, and class while reinforcing power differentials. Norm-generating mediation carries implicit values that are reinforced by mediators while norm-educating mediation is unequivocally mediator driven. Both of these models, or versions of them, are used frequently in employment discrimination cases.

Employee rights advocates continue to believe that mediation has been vastly "oversold." Thus far, mediators do not have a uniform code of professional ethics and, despite several decades of development, the field has yet to develop a "best practices" standard for practitioners. As mediation emerges as a favored form of ADR in United States courts and continues to be promoted as a forum through which women and minority employees can successfully resolve claims of discrimination at work,²¹⁷ the processes of mediation, the outcomes of mediation, and the mediators themselves warrant greater scrutiny than they have been subject to thus far.

214. Delgado et al., *supra* note 31, at 1392.

215. *Id.* at 1392-93.

216. Feher, *supra* note 188, at 179.

217. See Harkavy, *supra* note 25, at 156; Urbanski & Portela, *supra* note 148, at 582; and Exon, *supra* note 167, at 599-00.

